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Ernesto Hernández-López
Chapman University School of Law

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INTERNATIONAL MIGRATION AND SOVEREIGNTY REINTERPRETATION IN MEXICO*

ERNESTO HERNÁNDEZ-LÓPEZ**

Can national experiences with international migration influence how domestic law applies the concept of sovereignty?¹ Yes. Recent

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** Assistant Professor of Law, Chapman University School of Law, and Research Fellow, Center for Global Trade and Development. Research for this essay was generously supported by a Faculty Research Stipend from the Chapman University School of Law. The author thanks Maria Isabel Medina and John Tehrani for providing insightful comments and line-by-line readings of prior drafts; Norma Ang of the Mexican Embassy in Washington, D.C., for her informative and generous descriptions; Tony Arnold, T. Alexander Aleinikoff, Jorge Chabat, Wayne Cornelius, Kevin Johnson, Donald Kochan, Susan Martin, Douglas Massey, Marc R. Rosenblum, Fernando Téson, Lilia Vasquez, and Stephen Zamora for their substantive suggestions; participants from the Chapman University School of Law COTES faculty forum 2005, Western Law Professors of Color Conference 2006, Biennial Immigration Law Teachers Workshop 2006, and LatCrit South-North Exchange 2006 on Theory, Culture and Law for their comments; Research Assistants Daniel Kim and Andrea Suarez for their dedicated support and helpful suggestions; and the staff of the Rinker Law Library for their diligent efforts. Any errors are solely the author’s.

1. This essay defines “sovereignty” as the “final political and legal authority,” a definition taken from F.H. Hinsley’s comprehensive historical study of sovereignty. He explains, “[S]overeignty was the idea that there is a final and absolute political authority in the political community; and everything that needs to be added to complete the definition is added if this statement is continued in the following words: ‘*and no final and absolute authority exists elsewhere.*’” F.H. HINSLEY, SOVEREIGNTY 26 (Cambridge Univ. Press 2d ed. 1986) (1966). For this essay, the norm of non-intervention classifies a country’s authority over immigration as within its domestic jurisdiction and is the final and absolute authority regarding their treatment. In this essay, “sovereignty” is synonymous with “international sovereignty,” which is different than “sovereignty” in a domestic legal system as between central and regional state authority.

developments in Mexico's doctrine of non-intervention within its foreign relations law suggest that transnational forces, in this case migrant-sending, influence the application of sovereignty concepts.² Based on the concept of international sovereignty and included in Article 89:X of Mexico's Constitution, the international law norm of non-intervention prohibits a country's foreign relations from interfering in another country's domestic affairs.³ Under traditional sovereignty reasoning, the norm of non-intervention prohibited Mexico from creating foreign policy directly addressing Mexican migrants in the United States because such a foreign policy would "intervene in U.S. jurisdiction."⁴

This essay's central claim is that recent developments suggest Mexican foreign relations law applies the sovereignty-based legal doctrine in less absolute and traditional manners.⁵ These changes are the

2. The norm of non-intervention delineates where a government's authority is allocated when a country conducts its foreign relations. In Mexico, this determination of where to allocate governmental authority is made by the Executive branch. This branch exercises foreign relations power, through power generated by Article 89 of the Constitution, which is the Constitutions Chapter III "Executive power." Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Artículo 89:X, Diario Oficial de la Federación [D.O.], 11 de Mayo de 1988 (Mex.) (labeling this power as the power "to conduct foreign relations and establish international treaties"(author's translation)).

3. *Id.* Article 89 governs how the Executive may conduct Mexico's foreign relations. As such, this essay labels this article as within Mexico's foreign relations law. Foreign relations law addresses Mexican nationals outside Mexico's territory, since this legal regime focuses on events abroad or overseas.

4. In this essay, "sovereignty application" and "sovereignty reasoning" refer to how legal doctrines use the concept of final legal authority (sovereignty). "Sovereignty-based legal doctrine" refers to legal norms that are justified with claims of final legal authority and exist because the government making these claims is a sovereign nation. For this essay, "absolute sovereignty" and "traditional sovereignty" both refer to the characterization of sovereignty as exclusive, autonomous, and independent authority. "Country" refers to what is often termed a "nation-state" or an independent political member of the international community. Because the author defines "nation" in terms of culture, race, religion, ethnicity and other commonly held attributes that can vary greatly within a state or political entity, the term "nation-state" is not used. Even though it is arguable which political entities have international sovereignty, for simplicity, this essay assumes countries are the only political entities with international sovereignty.

5. Free trade measures and international agreements between Mexico and the United States, and the resulting integration, has incited a discussion of whether there

result of a “transnational influence,” which occurs when sovereign authority is conceptualized to include the interests of actors outside national borders. In 2001, Mexico conducted its most active campaign to lobby U.S. lawmakers for reforms to U.S. immigration laws. The developments are the opposite of the non-intervention doctrine’s traditional reasoning, indicating that foreign relations may influence other countries’ domestic affairs.

This essay highlights how traditional sovereignty reasoning, e.g. absolute sovereignty, in Mexico has been replaced by a more transnational interpretation of sovereignty.⁶ Over the last decade, Mexico’s efforts to influence U.S. lawmaking indicate transnational elements in sovereignty conceptions. This shift is eye-catching because the non-intervention doctrine is based on ideas of absolute sovereignty. Conceived as a nineteenth-century application of sovereignty concepts,

will be changes in sovereignty for the two neighbors. See Joyce Hoebing et al., *Preface* to NAFTA AND SOVEREIGNTY: TRADE-OFFS FOR CANADA, MEXICO, AND THE UNITED STATES, i, xi (Joyce Hoebing et al. eds., 1996); Stephen Zamora, *Symposium International Law in the Americas: Rethinking National Sovereignty in an Age of Regional Integration*, 19 HOUS. J. INT’L L. 1 (1997). Similarly, scholarly and activist perspectives on antisubordination, often from the southern/periphery, ethnic minority, gendered, or racially discriminated perspectives, convincingly question whether there can be changes to sovereignty in international law. See Berta Esperanza Hernández-Truyol, *International Law, Human Rights, and Latcrit Theory: Civil and Political Rights—An Introduction*, 28 U. MIAMI INTER-AM. L. REV. 223, 239-40 (1997); Elizabeth M. Iglesias, *International Law, Human Rights, and Latcrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 186-87 (1997).

6. This essay focuses on how a sovereignty-based legal doctrine, non-intervention, is applied differently as its reasoning changes over time. The sovereignty-focus of this essay relates solely to migration and foreign relations and not to other sovereign powers such as defense, war powers, or delegation of state (regional) versus federal (central) authority. International migration is a transnational force because it intrinsically involves people crossing national borders. Because international migration changes how sovereignty concepts are applied and reasoned and because the motivation for these changes is to benefit migrants, this essay labels these changed applications as a “transnational influence.” A “transnational influence” happens when sovereign authority is conceptualized to include the concerns of events or actors across national borders. Because the movement of people across borders to receiving societies, and from sending societies, has produced changes in legal doctrines, international migration is characterized as having a transnational influence. See generally JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* (1998) (presenting a current use of traditional sovereignty definitions and absolute sovereignty reasoning).

non-intervention seeks to exclude foreign influence in domestic issues.⁷ Ultimately, non-intervention is supposed to protect independent and autonomous sovereign authority from external threats.⁸ The traditional application of non-intervention delineated sovereign authority as any issue within domestic jurisdiction. If an issue fell within domestic jurisdiction, another country could not, in theory, intervene. Currently, more transnational elements characterize the limits of sovereign authority.

This essay provides an introductory observation on how international migration influences a shift in sovereignty reasoning—from absolute reasoning to more transnational reasoning—in Mexican foreign relations law.⁹ It argues that an understanding of international migration (the socio-economic process of people moving across national borders) portrays the reality that international law in Mexico attempts to govern.¹⁰ International migration is described as a transnational

7. See Fernando Tesón, *Changing Perceptions of Domestic Jurisdiction and Intervention*, in BEYOND SOVEREIGNTY 29, 30 (Tom Farer ed., 1996) (explaining that prohibited intervention is “coercive” but not necessarily forcible and “the ends of the intervention must be to influence another state on a matter falling under the state’s domestic jurisdiction”); Lori Fisler Damrosch, *Changing Conceptions of Intervention in International Law*, in EMERGING NORMS OF JUSTIFIED INTERVENTION 91, 91 (Laura W. Reed & Carl Kaysen eds., 1993) (explaining “intervention’s” general meaning in international law as “an improper interference by an outside power with the territorial integrity or political independence of a state.”).

8. See Marc Trachtenberg, *Intervention in Historical Perspective*, in EMERGING NORMS OF JUSTIFIED INTERVENTION, *supra* note 7, at 15, 15 (discussing the history of intervention); Damrosch, *supra* note 7, at 91 (explaining that the legal rules against intervention are seen as safeguards against abuses of power).

9. See generally Jorge Chabat, *Mexico’s Foreign Policy After NAFTA: The Tools of Interdependence*, in BRIDGING THE BORDER: TRANSFORMING MEXICO-U.S. RELATIONS 33 (Rodolfo O. de la Garza & Jesús Velasco eds., 1997) (describing the process that predicts how increased interdependency between Mexico and the United States would result in changes to the doctrine of non-intervention in Mexican law).

10. This essay takes a similar position to that of Professor Paul Schiff Berman stating that an academic focus on sovereignty (how it is defined, what it is, and what it should be) may not further an understanding of transnational “norm development and governance.” Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 530 (2005). This is because the actors involved often lack official or real power/force and the relevant dynamic encompasses more than one country. See *id.* at 523-30. Professor Kal Raustiala provides a similarly innovative concept stressing that sovereignty and territoriality are “at

subject, meaning its effects are felt across national boundaries and experienced in both origin and destination countries. U.S. experiences with international migration are primarily as a receiving country, while Mexico's experiences are as a sending country.¹¹ This essay's transnational lens is comprised of one social phenomenon (international migration), one international law concept (sovereignty), and one interaction (how the social phenomenon influences legal reasoning).¹² It tracks migration and charts changes in sovereignty-reasoning from Mexico's migrant-sending loci.

To prove these claims, Section I presents how immigration should be studied as a transnational subject because its effects are experienced in both sending and receiving countries. This approach helps identify how changes in the non-intervention doctrine are deviations in applying absolute sovereignty reasoning, and suggests instead that there is a current transnational influence in this reasoning. Section II describes how the Mexican non-intervention doctrine is based on absolute sovereignty ideals. It envisions sovereign authority over immigrants in national territory and domestic law-making or migrant regulation, as exclusive and without limitations. Domestic jurisdictions set these limits as exclusive. Mexico's foreign relations law envisioned sovereignty in these traditional terms.¹³ Section III reports how Mexican foreign relations law has reinterpreted the norm of non-intervention and applied it differently. Traditionally, the norm re-

odds" with contemporary legal doctrines and the exercise of jurisdiction. Kal Ruas-tiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2504 (2005).

11. While not a focus of this essay, this does not suggest that Mexico only sends migrants and the United States only receives migrants. Both countries' legal systems are influenced by their respective emigration and immigration experiences.

12. This transnational focus is in the spirit of Kim Barry's research on emigration and "external citizenship." See generally Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006). Barry's research examines how the concept of citizenship exists even though citizens may emigrate from the territory of the country of which they are citizens. See *id.* at 20-34. In this essay, emigration, as studied by Barry, is Mexico's sending-experience. Similar to Barry's analytical focus on emigration and citizenship, this essay focuses on emigration and sovereignty.

13. The norm of non-intervention has changed in the humanitarian intervention context as well. International law has evolved to recognize distinctions between national and international jurisdiction, and in certain circumstances, intervention for humanitarian reasons is not regarded as breaching the norm of non-intervention. See generally Tesón, *supra* note 7.

sulted in Mexico's "policy of no-policy," with Mexico failing to advocate for its nationals overseas. Since the mid-1990s, Mexican foreign relations have deviated from this rigid interpretation with aggressive lobbying of U.S. lawmakers for changes to U.S. immigration law, an active program representing migrants through Mexican consulates, representing migrant and Mexican concerns to U.S. policy makers, and seeking an immigration agreement with the United States.¹⁴ Section IV concludes by analytically incorporating doctrinal changes in Mexican law with a transnational analysis of sovereignty concepts.

I. MIGRATION: TRANSNATIONAL SUBJECTS AND LEGAL ANALYSIS¹⁵

This essay uses a transnational perspective to examine how sovereignty reasoning changes in Mexican law.¹⁶ The case of Mexican migration to the United States is ripe for transnational analysis because emigration from Mexico is such a sustained and influential activity.

14. Due to concerns of brevity, this essay does not elaborate on other important legal changes in Mexico that reinterpret the norm of non-intervention. For instance, Mexico eliminated restrictions in its nationality law, effectively permitting dual-nationality. This confirmed that Mexican nationals would not lose or have to relinquish their Mexican nationality if they became naturalized United States citizens. These changes were instituted to permit Mexicans abroad and specifically in the United States to retain links with Mexico. A central objective of Mexican policy makers was that these dual-national Mexican citizens could vote in U.S. elections, as U.S. citizens, and influence U.S. immigration policy. For a detailed description of these changes, see generally David Fitzgerald, *Rethinking Emigrant Citizenship*, 81 N.Y.U. L. REV. 90 (2006).

15. This essay takes inspiration from Berman's examination of how international legal norms are disseminated, drawing interdisciplinary insight from international relations theory, anthropology, sociology, critical geography, and cultural studies disciplines. Berman, *supra* note 10. These disciplines explain how "people actually form affiliations, construct communities, and receive and develop legal norms, often with little regard for the fixed geographical boundaries of the nation-state system." *Id.* at 489-90. This essay embraces perspectives and findings from the migration studies and international relations disciplines.

16. Professor Ediberto Román suggests a similar transnational analysis for Latina/o issues in the Americas. Ediberto Román, *Latcrit VI, Outside Jurisprudence and Looking Beyond Imagined Borders*, 55 FLA. L. REV. 583 (2003). Professor Enid Trucios-Haynes makes similar suggestions looking at migration and sovereignty as having transnational influences. See generally Enid Trucios-Haynes, *Latcrit Theory And International Civil And Political Rights: The Role of Transnational Identity And Migration*, 28 U. MIAMI INTER-AM. L. REV. 293 (1996-1997).

Mexico's population in the United States is estimated to be 9.9 million, with an additional 16.8 million persons born in the United States claiming Mexican ancestry, and 98.7% of all Mexicans emigrating have the United States as their destination.¹⁷ Such focused emigration from Mexico and constant immigration to the United States provides a canvas to apply transnational analysis, examining the effects of emigration and immigration on domestic law. A transnational analysis permits studying one legal concept, sovereignty, and how international migration influences changes in domestic law's interpretation of sovereignty. Countries have different migration experiences, from migrant-receiving and migrant-sending contexts. These contexts influence change in sovereignty-reasoning in domestic law.¹⁸ This section provides a working definition of transnational analysis, applies it to the migration-sending context, and identifies transnational influences in how sovereignty is currently reasoned within Mexico's non-intervention doctrine.

Definitions of "transnationalism" for immigration purposes generally refer to migrants (the people who cross international borders) and migration (the act of crossing) as having political, cultural, social, and economic relationships in sending and receiving societies, e.g. countries of departure/origin/home and countries of arrival/destination/host.¹⁹ This analysis is beneficial because it examines

17. Fitzgerald, *supra* note 14, at 91 n.2 (summarizing DOUGLAS S. MASSEY ET AL., *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM* 73 (1998) and CONSEJO NACIONAL DE POBLACIÓN, *Migración Mexicana Hacia Estados Unidos*, www.conapo.gob.mx/mig_int/03.htm (last visited Oct. 6, 2006)).

18. This legal examination follows paths suggested by Saskia Sassen and Cheryl Shanks who, from social science perspectives, independently conclude that migration changes international sovereignty. See generally SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN THE AGE OF GLOBALIZATION* (1996) (explaining how the global movement of capital and people indicates sovereignty is no longer confined to the nation-state); CHERYL SHANKS, *IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY, 1890-1990* (2001) (explaining how changes in U.S. immigration policy, and their justifications, are responses to perceived threats to U.S. sovereignty).

19. Although these terms are heavily debated, this essay only elucidates there are two separate countries where sovereignty reasoning is being influenced by migration, with terms "departure," "origin," "home," and "sending" referring to the same country and "arrival," "destination," "host," and "receiving" referring to the same country. Rainer Baubock suggests "political transnationalism" includes how

relationships and consequences in both the localities where migrants departed from and the localities where migrants currently reside. Applying this analysis from the social, economic, or political disciplines to legal scholarship is beneficial because it highlights how national legal systems are influenced by foreign forces. This analysis shows how different national legal systems face similar, but not identical, experiences when addressing migration. A key assumption of this essay is that legal regimes in both Mexico and the United States are influenced by migration even though their experiences as sending and receiving countries vary.²⁰ Alejandro Portes builds on this by arguing that when government policies are transnational they are reacting to, and thus occur after, popular transnational activity.²¹ This results in a sense of agency in political change in sending and receiving societies for migration and migrants.²² Transnational social science research on migration between Mexico and the United States is quite sophisticated, inspiring similar legal doctrine analysis.²³ For a legal focus,

migration influences political change in host and origin countries, with migrants having “overlapping memberships” in independent and territorially separated polities. See Rainer Baubock, *Towards a Political Theory of Migrant Transnationalism*, 37 INT’L MIGRATION REV. 700, 700-02 (2003). Linda Basch et al. define “‘transnationalism’ as the processes by which immigrants forge and sustain multi-stranded social relations that link to together their societies of origin and settlement” which “cross geographic, cultural, and political borders.” LINDA BASCH ET AL., *NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION STATES* 7 (1994).

20. For a discussion of how international relations and domestic social perspectives on migrants may influence how sovereignty, as expressed in the plenary power doctrine, influences recent U.S. judicial immigration lawmaking, see Peter Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 (2002).

21. Alejandro Portes, *Conclusion: Theoretical Convergencies and Empirical Evidence in the Study of Immigration Transnationalism*, 37 INT’L MIGRATION REV. 874 (2003). “Popular activity” refers to efforts led not by governments or political entities but by persons who are not acting in representation or in the duty of a state. Portes’ transnational examples include new cultural practices brought on by migrants changing value systems, migrants becoming the equivalent of economic exports for migrant sending countries, migrants’ political influence in origin and host countries, and the sending countries’ increasing adoption of dual nationality and dual citizenship regimes. See *id.* at 878-80.

22. See *id.* at 875-76 (describing transnationalism in migration as a “grassroots phenomenon”).

23. One example is David Fitzgerald’s analysis of dual nationality and legal voting rights for Mexicans abroad and the corresponding influence of links between

Judge Philip Jessup defines “transnational law” as “law which regulates actions or events that transcend national frontiers.”²⁴ This differs from studying national law (rules belonging to one country) or international law (rules governing interactions between countries).

Taking these claims, that migrants have a political influence in both sending and receiving societies, governmental action promoting transnationalism responds to popular activity, and domestic law may have a transnational focus, this essay asks: is there a transnational influence in the law used to regulate migration from Mexico? This inquiry gains significance because the legal doctrine governing migrant-sending is based on legal assumptions squarely rejecting transnationalism. Mexican foreign relations law is based on absolute sovereignty concepts in the doctrine of non-intervention.²⁵ Absolute sovereignty claims a sovereign country’s authority is exclusive and independent.²⁶

communities located in United States and Mexican territories. See DAVID FITZGERALD, *NEGOTIATING EXTRA-TERRITORIAL CITIZENSHIP* (2000); David Fitzgerald, “For 118 Million Mexicans:” *Emigrants and Chicanos in Mexican Politics*, in *DILEMMAS OF POLITICAL CHANGE IN MEXICO* 523 (Kevin Middlebrook ed., 2004); Fitzgerald, *supra* note 14. Another example is Marc Rosenblum’s research on the interaction between domestic and international interests in U.S. immigration policy and Mexican foreign policy on migration. MARC R. ROSENBLUM, *THE TRANSNATIONAL POLITICS OF U.S. IMMIGRATION POLICY* (2004) [hereinafter ROSENBLUM, *TRANSNATIONAL POLITICS*]; Marc R. Rosenblum, *Moving Beyond the Policy of No Policy: Emigration from Mexico and Central America*, 46 *LATIN AM. POL. AND SOC’Y* 91 (2004) [hereinafter Rosenblum, *Moving Beyond*]. A third example is Robert Smith’s ethnographic analysis of sustained links and leaving and returning in Mexican migrant communities in New York and Puebla, Mexico. See ROBERT C. SMITH, *MEXICAN NEW YORK: TRANSNATIONAL LIVES OF NEW IMMIGRANTS* (2006).

24. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956).

25. Raúl Benítez Manaut, *Sovereignty, Foreign Policy, and National Security in Mexico, 1821-1989*, in *NATURAL ALLIES? CANADIAN AND MEXICAN PERSPECTIVES ON INTERNATIONAL SECURITY* 60 (H.P. Klepak ed., 1996).

26. See Tom Farer, *Introduction* to *BEYOND SOVEREIGNTY*, *supra* note 7, at 5-8; Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 *WIS. L. REV.* 965, 1002-10 (describing how characterizations of absolute authority are common in the historic international law development of the concept of sovereignty); Meredith K. Olafson, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 *GEO. IMMIGR. L.J.* 433, 437-39 (1999); Rosario Green & Peter Smith, *Introduction* to *FOREIGN POLICY IN U.S.-MEXICAN RELATIONS* 1, 7 (Rosario Green & Peter Smith eds., 1989) (explaining that historically Mexican foreign relations emphasized international juridical order as the “most effective means of de-

This rejects tolerating any transnational influence. Put bluntly, a transnational subject is governed by a legal regime based on rejecting transnationalism.²⁷ This inquiry gains historical relevance because non-intervention was developed over a century ago, when migration was not regarded as having transnational effects, and sovereignty primarily valued autonomous and absolute authority.²⁸

fending sovereignty and integrity of Mexico and of other nations, especially weaker countries in the world”).

27. For instance, migration from Mexico to the United States is a transnational force, because migrants relocate to the United States and their influence transcends national borders. Their influence does not remain solely within the United States, where they are physically located. Migrants may earn income and live in the United States, but they send funds back home and retain close cultural, social, and political links with Mexico. Many Mexican domestic contexts, from politics to economics, depend on influence from across national borders, brought on by this migration. Mexican foreign relations law governs or seeks to influence immigration. This legal regime, though, is based on absolute sovereignty, i.e. non-intervention. This traditional conception of sovereignty classifies a sovereign’s authority as exclusive and autonomous, thereby rejecting any influence from across a national border.

28. Notions of absolute sovereignty have changed in the last century with the increased importance of individual human rights after the Nuremberg trials, as well as with the increase in relations and interdependency between countries. See Farer, *supra* note 26 at 7-8. The non-intervention doctrine was developed in the nineteenth century, when Mexico and the United States sought international legitimacy and centralized legal authority and international law primarily valued autonomy and independence (to the exclusion of shared authority or international cooperation). These doctrines were developed when each country’s geopolitical and international law contexts mandated absolute conceptions of sovereignty. But currently international relations increasingly value interdependency and sharing elements of sovereign authority. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (examining the possibility of countries sharing and cooperating through networks to promote global governances). For an excellent analysis of how non-intervention has decreased in importance in U.S.-Mexican relations due to increased interdependence and cooperation between the two countries see generally Thomas J. Biersteker, *The Rebordering of North America?: Implications for Conceptualizing Borders after September 11*, in *THE REBORDERING OF NORTH AMERICA: INTEGRATION AND EXCLUSION IN A NEW SECURITY CONTEXT* 153 (Peter Andreas & Thomas J. Biersteker eds., 2003).

II. ABSOLUTE SOVEREIGNTY IN NON-INTERVENTION

A country's authority to regulate migration and to conduct foreign relations derives from its international sovereignty.²⁹ Non-intervention was conceived in the nineteenth century as a legal application of absolute sovereignty.³⁰ When the doctrine was developed, legal definitions of sovereignty primarily focused on absolute descriptions of this authority.³¹ "Absolute sovereignty" refers to a definition of sovereignty as exclusive, autonomous, and independent authority.³² To violate this authority is to share, limit, question, or interfere with it. Non-intervention is an application of traditional sovereignty because it regards a sovereign nation's authority as within its domestic jurisdiction as independent and exclusive which should not be subject to foreign influence.³³ By setting absolute and exclusive demarcations, non-intervention exemplifies a traditional sovereignty application. With these strict lines, non-intervention protected absolute sovereignty from the external threats of another country interfering in domestic affairs.

For over a century, the doctrine of non-intervention determined numerous foreign policy decisions in Mexico.³⁴ Codified in Article 89 paragraph IX of Mexico's Constitution, the norm of non-intervention prohibits Mexico from interfering in another country's

29. These powers are articulated as the power to have foreign relations and the power to regulate the entry and removal of foreign nationals. "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987). *See generally* Thomas C. Heller & Abraham D. Sofaer, *Sovereignty: The Practitioners' Perspective*, in PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL RESPONSIBILITIES 24 (Stephen D. Krasner ed., 2001) (giving background on the concept of sovereignty).

30. Trachtenberg, *supra* note 8, at 15-16. *See generally* ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS (1956).

31. *See* THOMAS & THOMAS, *supra* note 30, at 77.

32. *Id.*

33. Tesón, *supra* note 7, at 29.

34. *See* Green & Smith, *supra* note 26, at 7. *See generally* Manaut, *supra* note 25 (discussing the history and evolution of Mexico's concept of national security).

domestic affairs.³⁵ Using concepts of traditional sovereignty, Mexico developed a “policy of no-policy” regarding its emigrants in the United States.³⁶ Mexico reasoned that a foreign policy on migrants intervened in U.S. jurisdiction because the United States possessed sovereign authority to govern aliens in its national territory.³⁷ With a traditional application by Mexico, U.S. jurisdiction over migrants meant U.S. sovereignty required an exclusive and independent exercise of this authority.³⁸ Thus, a Mexican foreign policy on migrants in the United States would violate the norm of non-intervention and U.S. and international sovereignty.

The international law norm of non-intervention was conceived as an outgrowth of absolute sovereignty, by prohibiting one country from influencing or interfering in the affairs of another country.³⁹ Countries followed the principle to avoid forcible (military or violent) and non-forcible (non-violent and often political) interference.⁴⁰ Nineteenth century international law scholars proclaimed, with the Monroe, Calvo, and Drago doctrines, the norm in reaction to European in-

35. Alonso Gómez-Robledo Verduzco, *Mexican Foreign Policy: Its Fundamental Principals*, MEX. L. REV. NO. 3, (2005), available at <http://info8.juridicas.unam.mx/cont/3/arc/arc5.htm>.

36. Carlos Rico F. explains that after the Bracero program (1942-62) (in which the United States invited Mexican influence) Mexico’s decision not to intervene was due “to respect [for] the ‘sovereign right’ of the United States to pass legislation on this question without attempting to influence the U.S. policymaking process.” Carlos Rico F., *The Immigration Reform and Control Act of 1986 and Mexican Perceptions of Bilateral Approaches to Immigration Issues*, in IMMIGRATION AND INTERNATIONAL RELATIONS: PROCEEDINGS OF A CONFERENCE ON THE INTERNATIONAL EFFECTS OF THE 1986 IMMIGRATION REFORM AND CONTROL ACT (IRCA) 90, 95 (George Vernez ed., 1990).

37. Carlos González Guitiérrez, *Decentralized Diplomacy: The Role of Consular Offices in Mexico’s Relations with its Diaspora*, in BRIDGING THE BORDER: TRANSFORMING MEXICO-U.S. RELATIONS, *supra* note 9, at 49, 49-50; Christopher Mitchell, *The Future of Migration as an Issue in Inter-American Relations*, in THE FUTURE OF INTER-AMERICAN RELATIONS 217, 227 (Jorge I. Domínguez ed., 2000); Rosenblum, *Moving Beyond*, *supra* note 23, at 108-09.

38. See Jorge Chabat, *The Making of Mexican Policy Toward the United States*, in FOREIGN POLICY IN U.S.-MEXICAN RELATIONS, *supra* note 26, at 73, 78.

39. See *supra* notes 29-32 and accompanying text.

40. See Hernan Vales, *The Latin American View of the Doctrine of Humanitarian Intervention*, J. OF HUMANITARIAN ASSISTANCE, Feb. 11, 2001, www.jha.ac/articles/a064.htm.

interventions (both imperial and economic) in the Western Hemisphere.⁴¹ If an issue fell within one country's jurisdiction, any foreign policy by another country on that issue breached the norm.⁴² Out of a concern for sovereignty, countries applied the norm in their foreign relations.⁴³ In a traditional sense, a country's sovereignty was absolute, unshared, and autonomous for regulating its borders and the entry of persons into its national territory. This traditional reasoning guided Mexico to avert intervening in U.S. affairs, resulting in Mexico not attempting to influence U.S. policy on its migrants.⁴⁴

The most recent articulation of the norm is in amendment X to Article 89 of the Mexican Constitution. Article 89:X presents seven "normative principles" including non-intervention, which the Executive Power observes in conducting Mexico's foreign relations.⁴⁵ Amendment X's other six principles include self-determination of nations, peaceful solutions to controversies, banishment of threat of or use of force in international relations, legal equality of states, international cooperation for development, and struggling for peace and international security.⁴⁶ Mexico's foreign policy has historically been characterized by an overly normative and doctrinal focus.⁴⁷ Mexican legal theorists and policymakers first applied the norm of non-

41. See THOMAS & THOMAS, *supra* note 30, at 55-64.

42. *Id.* at 15-16.

43. *Id.*

44. See generally Rosenblum, *Moving Beyond*, *supra* note 23.

45. Article 89:X was included in 1988 to align Mexico's foreign relations authority with contemporary international law. Verduzco, *supra* note 35. Mexico's Constitutional framework for the Executive power is contained in Articles 80 to 93. Article 89 specifically assigns Executive powers such as the power to execute laws passed by Congress, declare war, name cabinet members, and, with approval from the senate, to conduct foreign relations and conclude treaties. STEPHEN ZAMORA ET AL., MEXICAN LAW 14, 142 (2004).

46. Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, Artículo 89:X, Diario Oficial de la Federación [D.O.], 11 de Mayo de 1988.

47. Mexican foreign policy was traditionally reduced "to a simple enumeration of principles," such as self-determination, political sovereignty, non-intervention, legal equality, international cooperation, and human rights. Guadalupe González, *The Foundations of Mexico's Foreign Policy: Old Attitudes and New Realities*, in FOREIGN POLICY IN U.S.-MEXICAN RELATIONS, *supra* note 26, at 21, 25.

intervention in the mid-nineteenth century.⁴⁸ Geopolitical concerns of an expansionary neighbor and European countries' being active in domestic politics and economics influenced Mexico to interpret sovereignty as independent authority.⁴⁹ Mexico defined international sovereignty as autonomy and legal equality among countries.⁵⁰

Initially, non-intervention for Mexico focused on protecting itself from the interference of foreign powers.⁵¹ With this reasoning, the principle was included in Mexico's foreign relations.⁵² The objective was that other countries' non-intervention in Mexican affairs would be reciprocated by Mexico's non-intervention in their domestic affairs.⁵³ A basic motive was that Mexico suffered from violations of its sovereignty with U.S. and European invasions of its national territory.⁵⁴ The objective of Mexican foreign policy was to avoid future invasions of national territory.⁵⁵ It proclaimed concerns for other newly independent countries with little military and economic power.⁵⁶ Historic examples of when Mexico protested U.S. intervention in the affairs of other countries include the overthrow of Jacobo Arbenz in Guatemala in 1954, campaigns against the Cuban revolution of 1959, military force in the Dominican Republic in 1965, pressures against Salvador

48. See MERCEDES PERENA-GARCÍA, *LAS RELACIONES DIPLOMATICAS DE MÉXICO* 35-36 (2001). Perena-García explains Mexican foreign policy's primary goals have been defending national sovereignty and promoting non-intervention. *Id.* at 29, 35-36, 53-54.

49. See Manaut, *supra* note 25, at 60-61; Biersteker, *supra* note 28, at 153-66 (discussing the implications of September 11 on U.S. border security).

50. Green and Smith explain that Mexico's foreign policy highly values "political negotiation and compliance with the norms of international law," and its "respect for the international juridical order is the most effective means of defending the sovereignty and integrity of Mexico and other nations, especially weaker countries of the world." Green & Smith, *supra* note 26, at 7.

51. Bernardo Sepúlveda Amor, *Los Intereses De La Política Exterior*, in *LA POLÍTICA INTERNACIONAL DE MÉXICO EN EL DECENIO DE LOS OCHENTA* 17, 17, 96-99 (César Sepúlveda ed., 1994).

52. See Manaut, *supra* note 25, at 60-61.

53. Amor, *supra* note 51, at 96-99.

54. See Manaut, *supra* note 25, at 60-61; Green & Smith, *supra* note 26, at 7.

55. Jorge Chabat explains that, for Mexican foreign policy, the "mere expression of opinion was regarded as an act of meddling," and thus violated the norm of non-intervention. Chabat, *supra* note 9, at 35.

56. See Green & Smith, *supra* note 26, at 8.

Allende in Chile (1970-73) and Nicaragua after the 1979 revolution, and the invasions of Grenada in 1983 and Panama in 1989.⁵⁷ Similar non-intervention protests include when Italy invaded Ethiopia (1935-36), Japan invaded China (1931-45), Germany annexed Austria (1939), Russia gained an interest in Finland (1939-40), and the Soviet Union invaded Afghanistan (1979-88).⁵⁸

With this, Mexico conceptually contributed to an international law framework that protected its own fragile independence. The significance of non-intervention in Mexican law becomes apparent by examining the country's geopolitical history. Mexican independence took place in 1821.⁵⁹ Transforming from the colony of *Nueva España* to the sovereign nation of Mexico, its territory included present-day Guatemala, El Salvador, Honduras, Nicaragua and the U.S. states of California, New Mexico, Arizona, Colorado, Nevada, Utah, and Texas.⁶⁰ By 1848, Mexico lost all of the mentioned territories. These losses came from wars with foreign countries and from foreign forces intervening in Mexican politics. The losses created a national fear that there could be future territorial losses or intervention.⁶¹

These ambitions to stop foreign influence and attain domestic independence appear as normative concepts in international law.⁶² These objectives painted sovereignty as absolute and exclusive, with countries proclaiming interference in each other's affairs as violations of their sovereignty. For many countries, the concept of absolute sovereignty was needed to protect their national independence.⁶³

Non-intervention is an international law concept steeped in historical applications beyond Mexico. Linda Damrosch explains that the first use of the term "non-intervention" in international law was by Emerich de Vattel in 1758.⁶⁴ Ann Van Wynen Thomas and A.J. Tho-

57. *Id.*

58. *Id.*

59. Manaut, *supra* note 25, at 58.

60. *Id.*

61. *Id.*

62. Mexico's foreign policy has historically been characterized by a normative, doctrinaire and legalist focus. González, *supra* note 47, at 24.

63. THOMAS & THOMAS, *supra* note 30, at xi-xii.

64. Damrosch, *supra* note 7, at 93 (citing Tomislav Mitrovic, *Non-Intervention in International Affairs of States*, in PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION 219 (Milan Sahovic ed.

mas Jr. identify the “birthplace” of the principle of non-intervention in the classic international law treatises of Christian Wolff and Emerich de Vattel.⁶⁵ Non-intervention gained conceptual sophistication with the Calvo and Drago Doctrines.⁶⁶ In 1868, Dr. Carlos Calvo, an acclaimed Argentine scholar, published his treatise *Le droit international théorique et pratique*, which described the principle of non-intervention.⁶⁷ Calvo reasoned that European interventions in the Americas compromised national independence and international sovereignty.⁶⁸ Coined the Calvo Doctrine, the treatise condemned intervention by foreign powers to collect on international money obligations such as claims by foreigners for the destruction of property or claims for unpaid financial obligations.⁶⁹ In 1902, Dr. Luis M. Drago, Argentina’s foreign minister, extended the concept to a prohibition of foreign intervention in order to coerce government payment of its public debt.⁷⁰ Both the Calvo and Drago doctrines illustrate the importance placed on absolute conceptions of sovereignty to limit foreign interference in domestic affairs.

The non-intervention norm became a fixture of Mexican foreign policy.⁷¹ In July 1867, President Benito Juarez declared equality and

1972)).

65. THOMAS & THOMAS, *supra* note 30, at 5. Wolff emphasized a country’s independency and natural liberty, with countries not having the right to interfere in the affairs of other countries. *Id.* Vattel explains that states have their own national concerns and no foreign power has the right to intervene in these affairs. *Id.* Non-intervention gained particular prominence in the Western Hemisphere beginning with the Monroe Doctrine in 1823, prohibiting European interference in Western Hemispheric affairs. *Id.* at 10.

66. *See generally* Luis M. Drago, *State Loans in Their Relations to International Policy*, 1 AM. J. INT’L L. 692 (1907); Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT’L L. 26 (1907).

67. THOMAS & THOMAS, *supra* note 30, at 56 n.7.

68. *Id.* at 56-57. In 1826, Simón Bolívar (liberator of Colombia, Venezuela, Panama, Peru, Bolivia, and Ecuador) pursued a “Treaty of Perpetual Union, League, and Confederation” between the newly independent [Gran] Colombia, Peru, and Mexico. *Id.* at 55-56. Although not ratified, the Treaty had the objective of common defense of the sovereignty and independence of all these nations against foreign subjection. *Id.* at 56.

69. *See* Hershey, *supra* note 66.

70. *See* Drago, *supra* note 66.

71. *See* Green & Smith, *supra* note 26, at 7. Rosario Green and Peter H. Smith explain that Mexico’s foreign policy developed “through the traumatic experiences

respect among nations to be a fundamental principle of Mexican foreign policy.⁷² This developed into the Juarez Doctrine, as Mexico began to exert a foreign policy amidst an expansionary neighbor and ever-watchful European forces. In 1913, President Francisco Madero affirmed the importance of this equality by explaining that relations between the United States and Mexico should “be based on respect for the sovereignty, the integrity and dignity of the Mexican Republic.”⁷³ These ambitions later characterized the Carranza Doctrine, which emphasized non-intervention and self-determination in international relations.⁷⁴ Presidents Juarez and Carranza responded to foreign intrusions in Mexican affairs. During Juarez’s political career, Mexico lost a large amount of its territory to the United States in the War of 1848.⁷⁵ For Carranza, Mexico was victim to extensive diplomatic and military intervention by the United States in Mexican territory during the Mexican Revolution, such as the invasion of Veracruz in 1914 and the U.S. pursuit of Pancho Villa in 1916.⁷⁶

In 1931, Foreign Relations Secretary Genaro Estrada developed another important facet of non-intervention.⁷⁷ Eventually labeled the Estrada Doctrine, his objective was for Mexico to remain neutral in foreign controversies and reject the common practice for countries to “recogniz[e] foreign governments.”⁷⁸ Often, European powers and the United States used this practice of recognition to influence the politi-

of threats to national sovereignty.” *Id.* at 7.

72. Manaut, *supra* note 25, at 60.

73. *Id.* at 61 (referring to the doctrine’s genesis in President Cenustiano Carranza’s declaration to the United States on April 22, 1914).

74. *Id.* at 62.

75. *Id.* at 60.

76. *Id.* at 62-63.

77. See Philip C. Jessup, *The Estrada Doctrine*, 25 AM. J. INT’L. L. 719, 719-23 (1931).

78. Jorge Chabat provides this translation of the Estrada Doctrine:

Mexico is not inclined to express recognition because it considers this a denigrating practice which, besides hurting the sovereignty of other nations, places them in a position in which their internal matters can lead to remarks by other governments, who have already assumed a critical attitude as they decided, favorably or unfavorably, to judge the legal status of foreign governments.

Chabat, *supra* note 9, at 44 (referencing SECRETARÍA DE RELACIONES EXTERIORES, GENERO ESTRADA: DIPLOMÁTICO Y ESCRITOR 135 (Santiago Roel ed., 1978)).

cal power of a specific actor or political party in another country's domestic politics. Domestic forces gained or lost political power because of this foreign influence. Influence was exerted by foreign governments recognizing or supporting one domestic interest over another. In developing the doctrine, Mexico instead proclaimed it would not judge or support any particular political actor in a foreign country.⁷⁹

III. MIGRANTS AND MEXICO'S REINTERPRETATION OF NON-INTERVENTION⁸⁰

In Mexico, the traditional sovereignty perspective was that migrants in the United States fell within U.S. jurisdiction because they were in U.S. territory.⁸¹ How they were treated once they crossed the international border into the United States was an exclusive issue within U.S. sovereignty. Accordingly, the norm of non-intervention applied a traditional version of sovereignty thereby prohibiting any Mexican influence regarding issues within U.S. jurisdiction. A change in the non-intervention concept occurred when the Mexican government stopped considering migrants from Mexico as solely within U.S. jurisdiction.⁸² In the mid-1990s, Mexican foreign policy

79. The objective was to avoid "producing situations where the legal capacity and national leadership of governments and authorities are subordinated to the opinions of foreigners." Manaut, *supra* note 25, at 64 (quoting Genero Estrada, *Obras Completas* (Mexico: Siglo XXI, 1988) 144). The Estrada Doctrine initially started as official instructions from Foreign Secretary Estrada to the Mexican diplomats abroad, but became a central and traditional objective of Mexican foreign policy. See Manaut, *supra* note 25, at 63-64 (explaining the Doctrine's importance); see generally Jessup, *supra* note 77 (explaining the Doctrine's contemporary relevance); *Estrada Doctrine of Recognition*, 25 AM. J. INT'L L. 203 (1931) (translating Secretary Estrada's instructions first articulating the Doctrine).

80. The greater part of this analysis follows Jorge Chabat's decades of groundbreaking foreign policy analysis. See Chabat, *supra* note 9.

81. See generally Rosenblum, *Moving Beyond*, *supra* note 23.

82. See generally Chabat, *supra* note 38. In 1988, Jorge Chabat explained that any change to Mexico's foreign policy in becoming more active in representing Mexican migrants, whether through the consulates or by seeking to influence laws such as IRCA, would require a change in interpretation of non-intervention. He explains the norm is a "cornerstone of Mexican foreign policy." *Id.* at 78. The norm is included in the Organic Law of Mexican Foreign Service, which forbids foreign service officers from intervening "in internal or political affairs of the country to which

started to define the treatment of its citizens outside of its national territory as a domestic concern.⁸³ This determination provided a conceptual base to move from “no policy” and to reinterpret the norm of non-intervention. This section elaborates on four examples since the 1990s in which Mexican foreign relations took sophisticated and nuanced approaches to advocating for migrants in the United States. These approaches seek to influence U.S. lawmaking and, in doing so, reinterpret the norm of non-intervention by reasoning sovereignty does not bar this influence.

Mexico’s first step from “no-policy” took place when it lobbied U.S. legislators in response to the proposed legislation that became the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁸⁴ IIRIRA eliminated many migrant rights and initiated the current focus of migration control through border security.⁸⁵ Sectors

they are assigned or in the country’s international affairs not having to do with Mexico.” *Id.* at 78 (citing “Ley Orgánica del Servicio Exterior Mexicana,” *Diario Oficial*, January 8, 1982, Article 48). Traditionally, Mexico did not lobby U.S. lawmakers for immigration reforms because it did not wish to “undermine its principled political opposition to such U.S. activities in Mexico.” JORGE I. DOMÍNGUEZ & RAFAEL FERNÁNDEZ DE CASTRO, *THE UNITED STATES AND MEXICO* 126 (2001).

83. See Chabat, *supra* note 9, at 39. The conceptual facilitator to re-interpret prior notions of non-intervention was a national recognition of interdependency between Mexico and events outside its borders. This was most evident during the Presidency of Carlos Salinas de Gortari (1988-1994). Jorge Chabat explains that during the Salinas presidency Mexico’s foreign relations identified the value of interdependency with the outside world and its foreign policy became more active, changing the concept of nonintervention and thus sovereignty. See generally Jorge Chabat, *Mexico’s Foreign Policy in 1990: Electoral Sovereignty and Integration with the United States*, 33 J. INTERAMERICAN STUD. & WORLD AFF. 1 (1991). From this, Mexican ideals of sovereignty shifted from a concept highlighting the international system’s autonomous and absolute authority between countries, to a concept emphasizing a country’s international cooperation, shared authority, and their interdependent relations. *Id.*

84. Rafael Fernández de Castro & Carlos A. Rosales, *Migration Issues: Raising the Stakes in U.S.-Latin American Relation*, in *THE FUTURE OF INTER-AMERICAN RELATIONS* 237, 247-50 (Jorge I. Domínguez ed., 2000); Rosenblum, *Moving Beyond*, *supra* note 23, at 111.

85. The comprehensive bill contained provisions that created three- and ten-year bars to reentry for aliens who were “unlawfully present,” expedited removals, a one-year filing deadline for asylum applications, changes to eligibility for suspension of deportation, increasing removability classification for alien-criminals, mandatory detention for immigrants convicted of certain crimes, and statutory limita-

of the U.S. public and lawmakers advocated for measures limiting or eliminating many rights or benefits enjoyed by migrants in the U.S.⁸⁶ Many immigration law reformers also called for increased deportations.⁸⁷ The prospect of restrictive reforms in the United States concerned Mexican migrants who, although outside national territory, exerted a large economic influence in Mexico.⁸⁸ There was an enormous fear in Mexico that IIRIRA would result in mass deportations.⁸⁹

IIRIRA was enacted nearly a decade after the Immigration Reform and Control Act in 1986 (IRCA).⁹⁰ Mexico did not lobby or attempt to influence U.S. legislators when IRCA was under consideration.⁹¹ IRCA's main proponent, Senator Alan Simpson, solicited support and input from Mexican President José López Portillo.⁹² The President, however, explained that although immigration reform in the United States did affect Mexican nationals, Mexico could not have a policy on this issue because it was the United States' sovereign right.⁹³ President López Portillo told Senator Simpson, who had gone to Mexico to attain support for IRCA, "You have a sovereign right to do what you want with your borders. But I am glad a man as sensitive as you appears to be in charge of immigration up there because I want you to look after our workers."⁹⁴

tions to judicial review over immigration law claims. See THOMAS ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY*, 440-42, 446-51, 529-33, 609-16 (5th ed. 2003). See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (1999) (outlining the major features of IIRIRA and arguing for legislative reform efforts to restore individual review by immigration judges).

86. DOMÍNGUEZ & FERNÁNDEZ DE CASTRO, *supra* note 82, at 153-54.

87. *Id.*

88. *Id.*; see also Rosenblum, *Moving Beyond*, *supra* note 23, at 111.

89. See DOMÍNGUEZ & FERNÁNDEZ DE CASTRO, *supra* note 82.

90. Domínguez and Fernández de Castro argue that dialogue between the United States and Mexico changed this pattern of non-engagement. *Id.* at 33.

91. See Rosenblum, *Moving Beyond*, *supra* note 23, at 107-08.

92. Richard W. Day, U.S. Senate Judiciary Comm. Subcomm. on Immigration and Refugee Affairs, Keynote Address at the Conference on the International Effects of the 1986 Immigration Reform and Control Act (May 1988), in *IMMIGRATION AND INTERNATIONAL RELATIONS*, *supra* note 36, at 19.

93. *Id.*

94. *Id.* (quoting Diego C. Asencio of the Commission for the Study of Interna-

In the mid-1990s, Mexico developed an active foreign policy regarding its migrants in the United States, through diplomatic and congressional lobbying, seeking to limit IIRIRA's most restrictive measures.⁹⁵ Mexico took a more "hands-on" or active approach to migrant issues. It focused bilateral consultations on migration issues, which Mexico had avoided in the past.⁹⁶ In the preceding years, Mexico gained extensive, but new, experience lobbying U.S. lawmakers for NAFTA ratification.⁹⁷ This effort took place in 1993 and 1994 as Mexico hired an impressive array of public relations firms, political consulting firms, and law firms in an effort to ensure that NAFTA would succeed and be implemented as U.S. law.⁹⁸ Legally, the ratification process required the U.S. Senate to approve the international treaty in order for it to become United States law.⁹⁹ The treaty was negotiated by the executive branches of the United States, Mexico, and Canada. In a more traditional perspective on non-intervention, Mexico would have avoided interfering in the U.S. legislative process and avoided lobbying U.S. lawmakers for NAFTA's passage. The treaty would have been negotiated without Mexico's active diplomatic involvement, and securing the treaty's implementation in the United States would have remained solely a United States domestic concern. In this light, Mexico taking the step to lobby U.S. legislators represented a big change. By trying to influence the U.S. lawmaking process, Mexico's lobbying was in conflict with its traditional perspectives on non-intervention. NAFTA involved enormous potential gains for

tional Migration and Cooperative Economic Development).

95. See generally Mitchell, *supra* note 37, at 219-22; Fernández de Castro & Rosales, *supra* note 84, at 248.

96. DOMÍNGUEZ & FERNÁNDEZ DE CASTRO, *supra* note 82, at 33.

97. Todd A. Eisenstadt provides a detailed analysis of Mexico's lobbying efforts, describing them as "one of the most dramatic increases ever in lobbying and public relations expenditures by a foreign government in Washington," a change from "one of Washington's most passive foreign players" to "one of the most visible," and representing estimated costs of \$67,229 between 1985 to 1991 to "at least \$9 million." Todd A. Eisenstadt, *The Rise of the Mexico Lobby in Washington: Even Further from God, and Even Closer to the United States*, in BRIDGING THE BORDER, *supra* note 9, at 89, 89.

98. *Id.*

99. U.S. CONST. art. II, § 2, cl. 2 (stating the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

Mexico's economy. The Mexican government viewed this as a domestic concern even though securing NAFTA's implementation implied substantial involvement in U.S. lawmaking.¹⁰⁰

Mexico sought to directly influence U.S. lawmaking on immigration issues beyond diplomatic channels as its foreign policy included lobbying for changes to IIRIRA. Building on NAFTA lobbying experiences, embassy, congressional, and executive branch liaisons met with INS, State Department, and Department of Justice officials, and congressional leaders serving on the Foreign Affairs and Judiciary Committees.¹⁰¹ They articulated Mexico's concerns over IIRIRA's restrictive provisions. Early versions of IIRIRA included the Gallegly Amendment, which denied school access to the children of undocumented migrants.¹⁰² Mexico lobbied for this amendment's exclusion in the Act's final version.¹⁰³ U.S. President Bill Clinton also lobbied for the amendment's exclusion and threatened to veto the bill if the Gallegly amendment was included.¹⁰⁴ Mexico's persistent and direct lobbying is seen as key to President Clinton's position on this amendment.¹⁰⁵

From an international law lens, a significant shift in sovereignty-reasoning occurred with Mexico's lobbying. Effectively, Mexico reinterpreted the norm of non-intervention because it did not regard its efforts to influence U.S. lawmaking as a violation of the norm. Mexico also moved away from absolute notions of sovereignty in its reasoning. In a significant shift, U.S. domestic jurisdiction over migration was not seen as exclusive. Mexico's participation in the U.S. legislative process was not impeded by a need to protect U.S. independence. Mexico did not view the U.S. legislative process as something exclusive of autonomous and absolute sovereign power. In-

100. See generally Eisenstadt, *supra* note 97.

101. Rosenblum, *Moving Beyond*, *supra* note 23, at 111; see DOMÍNGUEZ & FERNÁNDEZ DE CASTRO, *supra* note 82, at 126-34; Chabat, *supra* note 9, at 33-47 (explaining how concerns for sovereignty and the doctrinal importance of non-intervention in Mexican foreign relations inhibited lobbying before NAFTA).

102. Rosenblum, *Moving Beyond*, *supra* note 23, at 111.

103. *Id.*

104. *Id.*

105. Mexico's foreign policy incorporating migrants grew out of decades of governmental networks set up between the United States and Mexican agents, working on diplomatic and migration issues in the 1975-1995 period. See generally *id.*

stead, Mexico could participate because it had a stake in the U.S. legislative process. Here is where a transnational influence in foreign relations law becomes evident. Foreign relations, based on domestic need, began to look across national borders to justify how to apply the norm. There is a subtle change from Mexico's non-involvement because of jurisdictional concerns for U.S. autonomy to a new position ensuring Mexico attains national benefits by influencing U.S. lawmaking. By seeking to influence U.S. laws, Mexico reinterpreted its norm of non-intervention. A rigid concern for U.S. jurisdiction would have prevented influencing U.S. lawmaking. These prior concerns justified Mexico's "policy of no policy." Under a traditional interpretation of non-intervention, Mexico would have limited its negotiation to diplomacy and not attempted to influence U.S. lawmaking.

A second step in Mexico's reinterpretation of the norm of non-intervention began in 1990, when it implemented the Program for Mexican Communities Living in Foreign Countries. This program fell under the authority of the Secretary of Foreign Relations.¹⁰⁶ The Program's goal was to build relationships between Mexican migrants abroad, Mexican-Americans in the United States, and the Mexican government.¹⁰⁷ Migrants in the United States became a central focus of the program. The Program eventually developed into a method for allowing the Mexican government to advocate and protect migrants' political and legal rights.¹⁰⁸

Before the Program's creation, Mexico's Consulates avoided any active support or engagement with Mexican migrants in the United States because of concerns over violating the international law norm of non-intervention.¹⁰⁹ The program's first director, Carlos González Guitiérrez explained:

106. See Fernández de Castro & Rosales, *supra* note 84, at 249.

107. *Id.* The program included educational exchange for Mexican teachers with U.S. schools, migrant community organization in the U.S., preventive health campaigns, cultural exchanges between home community governments and migrant organizations, soccer leagues, youth programs, and fund drives for home community development projects. Carlos González Guitiérrez, *Fostering Identities: Mexico's Relations with Its Diaspora*, 86 J. AM. HIST. 545, 546 (1999).

108. See Fernández de Castro & Rosales, *supra* note 84, at 249.

109. González Guitiérrez, *supra* note 37, at 49.

The crux of the problem for the consulates was the issue of nonintervention. As the relationship between the two nations has strengthened, it is becoming more difficult to clearly distinguish boundaries between domestic and foreign policies. The new functions of the Mexican consular offices are not a cause but rather a reflection of this change.¹¹⁰

He explains that Mexico's consulate redefined its role to support, represent, advocate for, and nurture home-nation ties for its migrants.¹¹¹ He adds "this redefinition required [Mexican Consulates] to surrender their simplistic and preestablished definitions of the principle of nonintervention."¹¹²

This redefinition of the consular role (engaging in activities previously viewed as exclusive to U.S. domestic affairs) is an example of Mexico's re-interpretation of the non-intervention norm. The barrier between foreign and domestic concerns is not as inflexible as in the past. This barrier has become more fluid with migrants and interests (political, economic, and cultural) flowing across international boundaries between U.S. and Mexican territory.¹¹³

A third example of Mexico's reinterpretation of the norm is evidenced by President Vicente Fox's migrant-focused foreign policy.¹¹⁴

110. *Id.* at 50.

111. *Id.*

112. *Id.* at 51.

113. Cultural forces influenced incorporation of migrants into Mexico's foreign policy. A consciousness rooted in past experiences with many U.S. invasions in Mexico, the Mexican Revolution fostered a nationalism that was defensive and anti-American. Nationwide sentiments of local pride, a defined national identity, and recollections of distant and close histories created a situation where Mexican nationalism included elements of anti-Americanism. This is not to suggest any manifest or latent hatred of U.S. civil society or the United States. Cultural feelings would often be suspicious of U.S. intentions. González Guitiérrez poignantly expands on the effect of this on migrants noting that "national culture was not very sensitive to the situation of the emigrants," and "for decades, as a country and as a government, we forgot our emigrants, with the shameful attitude of a mother who abandoned her children and does not want to know about them." González Guitiérrez, *supra* note 107, at 551. He adds: "Instead of promoting the image of the emigrant who goes abroad to make good for his family and homeland, a Mexican national culture dominated by collective guilt feelings made assimilation or multiculturalism synonyms for disloyalty and treason." *Id.*

114. See generally Pamela Starr, *U.S.-Mexico Relations*, HEMISPHERE FOCUS (Center for Strategic & Int'l Stud., Washington, D.C.), Jan. 9, 2004; Rafael

Fox's presidency (2000-06) initiated a political discourse of displaying Mexico's redemocratization with an engaged foreign policy, based on democracy, human rights, and multilateralism. Fox's discourse added to Mexico's efforts to reinterpret non-intervention.¹¹⁵ Fox sought the creation of a migration agreement with the United States as a step towards Mexico's longer-term goals of foreign policy.¹¹⁶ Mexico initiated the migration negotiation with the United States and prioritized discussion with the Department of Justice, State Department, Office of the President, and key congressional members.¹¹⁷ Mexico presented the issue as important for U.S. domestic concerns by stressing how untaxed or underground migrant labor decreased the U.S. social security tax base, how U.S. Hispanic voters would approve many pro-migrant measures, especially a comprehensive reform measure, and the security benefits of incorporating "undocumented" or "illegal" foreign nationals.¹¹⁸ In April of 2001, Mexico proposed a five-part plan, colloquially referred to as the "whole enchilada."¹¹⁹ This plan was comprised of temporary worker, regularization, regional development programs, improved border security, and increased visa allotments.¹²⁰

Fernández de Castro, *La Migración Sobre la Mesa de Negociación*, in CAMBIO Y CONTINUIDAD EN LA POLÍTICA EXTERIOR DE MÉXICO 111, 111-129 (Rafael Fernández de Castro ed., 2002).

115. In describing Mexican Foreign Relations Secretary Jorge Castaneda's foreign policy goals, Ambassador Heller reiterated that Mexico's six principles that confirm sovereignty between nations have evolved from concepts of unshared authority and are increasingly shared between nations, non-state actors, and multilateral institutions. See Claude Heller, *Los Principios de la Política Exterior a la Luz del Contexto Internacional*, in CAMBIO Y CONTINUIDAD EN LA POLÍTICA EXTERIOR DE MÉXICO, *supra* note 114, at 77-78.

116. Starr, *supra* note 114, at 5.

117. Fernández de Castro, *supra* note 114.

118. *Id.* at 113.

119. Starr, *supra* note 114, at 4; Duncan Campbell, *Mexico Goes for the Whole Enchilada*, GUARDIAN UNLIMITED, Sep. 5, 2001, <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,547248,00.html>.

120. The five-part proposal included: (1) a temporary worker plan in various sectors beyond agriculture, reflecting cyclical migration trends and encompassing between 250,000 and 350,000 workers; (2) a regularization program for undocumented Mexicans in the United States—a population estimated to be near 3.5 million people; (3) a regional development program in Mexican communities with high emigration rates, here, the focus was on emigration caused by economic forces in

Ultimately, these negotiations failed to reach an agreement, much of this due to the U.S.'s changed security context after the September 11 attacks and the resulting changes in domestic political attitudes in both countries.¹²¹ The most contentious point was regularization. For Mexico, it represented the most attractive benefit for its foreign policy.¹²² It also meant the most significant change in U.S. policy. Regularization also presented the greatest change in non-intervention, because it suggested the United States relinquish immigration law claims against migrants.¹²³ Likewise, negotiating this point suggested

Mexico; (4) improved border security, seeking to decrease the number of deaths suffered by border crossers and to eliminate human trafficking; and (5) a revised visa allotment made to Mexican nationals, within the existing NAFTA-TN visa framework. Fernández de Castro, *supra* note 114, at 122-23. The heart of the proposal was the temporary worker program and regularization. *Id.* at 23. Mexico's inclusion of these elements were to compliment domestic forces in the United States, such as the AFL-CIO, Hispanic political groups, and migrant-rights groups, already advocating for these changes. *Id.*; see also Starr, *supra* note 114, at 4.

121. See generally Rafael Fernández de Castro, *Seguridad y Migración un Nuevo Paradigma*, FOREIGN AFFAIRS EN ESPAÑOL, Oct.-Dec. 2006, <http://www.foreignaffairs-esp.org/20061001faenespessay060402/rafael-fernandez-e-castro/seguridad-y-migracion-un-nuevo-paradigma.html?mode=print>. For the United States, immigrant issues took on a more security-focus and suspicious tone after September 11, and its foreign policy reflects this as well. Starr, *supra* note 114, at 6-7. While in Mexico, the public viewed the United States' response to September 11 as an act of aggression against Iraq and suggestive of an imperialist foreign policy. *Id.* The United States believed Mexico was failing in its partnership with the United States and "obstructing the United States in the U.N. on a matter of U.S. national security." *Id.* Ultimately, Mexico declared that it would not have supported the U.S. resolutions in 2003 seeking U.N. support for the invasion of Iraq. *Id.* at 7. These events signified temporal disunion of the diplomatic closeness regarding migration shared by the two neighbors from 2000-2001. *Id.* at 6-7.

122. Fernández de Castro, *supra* note 114, at 123-25.

123. In approving any regularization or amnesty of undocumented or illegally present aliens the U.S. Congress is determining to forego some of the sovereign power the United States may have. Border control and immigration law are sourced in international sovereignty. See generally T. ALEXANDER ALENIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 11-13 (2002); STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* (4th ed. 2004) (presenting foundational cases, doctrinal development, and recent changes to the plenary power doctrine, which is sourced in international sovereignty). Any law, whether a product of domestic lawmaking or an international treaty, that alters immigration or border functions by the United States is thus an exercise of sovereignty. For a policy perspective, which this author does not

that the United States, through an international agreement, would cede its sovereign authority to determine who is legally present in the United States. For many sectors of the U.S. public, and thus politicians, regularization for any unlawfully present migrant would reward prior immigration law violations. For U.S. politicians, including such a provision in any international agreement or domestic legislation was not politically viable.¹²⁴

An initial review of Mexico-U.S. foreign relations since September 2001, suggests much discord regarding migration. Importantly though, Mexico has not returned to “no policy” on migrants in the United States or stopped trying to influence U.S. lawmaking.¹²⁵ The North American neighbors have found common ground and instituted agreements in the economic development, border security, and security cooperation areas.¹²⁶ Each agreement is presented as decreasing migration pressures. Similarly, Mexico’s diplomats advocate for a migration agreement and improved treatment for migrants in the United States.¹²⁷ These issues remain part of the bilateral discourse as an integral part of Mexican foreign relations and an influential element in U.S. immigration lawmaking.¹²⁸ Border security and eco-

agree with, that a migration agreement with Mexico unwisely limits U.S. authority and congressional power, see ROBERT S. LEIKEN, CTR. FOR IMMIGRATION STUDIES, ENCHILADA LITE: A POST-9/11 MEXICAN MIGRATION AGREEMENT (2002), *available at* <http://www.cis.org/articles/2002/leiken.pdf>.

124. LEIKEN, *supra* note 123.

125. See Press Release, Embassy of Mex., Mexico’s Position on the Announcement of the U.S. Senate to Renew Debate on Immigration Reform (May 11, 2006), *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=200&Itemid=67; Press Release, Embassy of Mex., Message from President Vicente Fox, After His Meeting with President Vicente [sic] George W. Bush (Mar. 30, 2006), *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=196&Itemid=67; Press Release, Embassy of Mex., Migration and Security: A Shared Responsibility (Nov. 2, 2005), *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=155&Itemid=67.

126. This essay does not fully examine the cooperation and agreements between the United States and Mexico, as they focus on economic, security, and border policy. This essay focuses on the concept of legal determinations using sovereignty regarding migration.

127. See *infra* notes 138-45 and accompanying text.

128. For an example of the working groups and discussions between Mexican diplomats and U.S. counterparts, agencies, and lawmakers, see Press Release, Em-

conomic policy fall squarely within a nation's sovereign powers. More traditional interpretations of non-intervention, however, would identify these areas as solely within U.S. jurisdiction and off-limits to Mexican foreign relations. Interestingly, security cooperation and regional development are similar to two points contained in Mexico's five-point proposal.¹²⁹

A fourth example of Mexico's non-intervention reinterpretation is how Mexican foreign policy to the United States continues to include a variety of immigration issues. These issues include seeking a migration agreement, lobbying for comprehensive migration reform of U.S. laws, and improved treatment of Mexican nationals in the United States.¹³⁰ Mexican officials explain how U.S. law, whether future effects of legislation, current agency policy, or judicial decisions, harm Mexican migrants in the United States. Examples of such harm include: Arizona's Proposition 200 (2005),¹³¹ vigilantism of the Minutemen on the Arizona-Sonora border since February of 2005, House passage of the border security-and-criminalization focused Sensenbrenner Bill (December 2005),¹³² and persistent requests for investigation into the deaths of migrant crossers.¹³³ U.S. border security policy has pushed border-crossers to seek more dangerous and less fortified

bassy of Mex., Secretary Luis Ernesto Derbez Paid a Working Visit to Washington (Oct. 26, 2005), *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=153&Itemid=67. *See generally* ROSENBLUM, TRANSNATIONAL POLITICS, *supra* note 23 (presenting how U.S. and Mexican political forces, as a two-stage process with domestic and international concerns for both Mexican and U.S. actors, influence U.S. immigration policy).

129. *See* DOMÍNGUEZ & FERNÁNDEZ DE CASTRO, *supra* note 82, at 122-23; Starr, *supra* note 114, at 4.

130. *See supra* notes 132-135 and accompanying text.

131. Press Release, Embassy of Mex., The Foreign Ministry of Mexico States Its Position on Passage of Proposition 200 (Taxpayer and Citizen Protection Act) in Arizona (Nov. 3, 2004), *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=90&Itemid=67.

132. Press Release, Embassy of Mex., The Mexican Government Rejects the Declarations of the California Governor Regarding the So-Called Minuteman Project (Apr. 29, 2005), *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=121&Itemid=67.

133. Press Release, Embassy of Mex., The Mexican Government Will Intensify Its Efforts to Achieve a Comprehensive Immigration Reform (Dec. 16, 2005), *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=156&Itemid=67.

paths. The direct and foreseeable consequence of this policy choice is an alarming increase in fatalities for border-crossers.¹³⁴ These deaths total over 1,900 since 1998, when the U.S. government began counting deaths, and average deaths per year are estimated at 404.¹³⁵ Seeking to decrease the number of deaths, Mexico issued a “Guide for Mexican Migrants” in January of 2005, which provides safety and institutional advice for crossers.¹³⁶

A fifth example of reinterpreting the non-intervention norm took place during the spring of 2006. As the U.S. Senate debated proposed immigration legislation and civil society in Mexico and the United States actively voiced its concerns in migrant advocate demonstrations, Mexican foreign policy continued to advocate for Mexican migrants’ interests and to influence in U.S. lawmaking. In February, Mexico presented a more nuanced immigration position in a resolution titled “Mexico and Migration Phenomenon,” approved by the Executive and Mexico’s Congress.¹³⁷ This plan stresses that migration is a shared governmental responsibility, has domestic and international consequences and causes, and should be regulated in coordination with border, security, economic, and immigration policies.¹³⁸ It emphasizes that current U.S. border policy forecloses many migrants returning to Mexico; instead, Mexico seeks a “circular migratory flow”

134. Wayne A. Cornelius, *Controlling “Unwanted” Immigration: Lessons from the United States, 1993-2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 783-84 (2005) (arguing a border control focus has resulted in: a redistribution of crossing along the Southwest border; “undocumented migrants” staying longer in the United States; dramatic increases in migrant deaths from “clandestine border crossings;” anti-immigrant violence on the border; and “no evidence that unauthorised [sic] migration is being deterred at the point of origin.”).

135. Olga R. Rodriguez, *Mexico’s Migrant-Smugglers Hike Rates*, ST. LOUIS POST-DISPATCH, June 14, 2006, at A19.

136. The guide was published in Spanish and English and clearly suggests migrants should not use false documents and should not employ smugglers or “coyotes.” Mexican Ministry of Foreign Relations, *Guide for the Mexican Migrant*, 1 www.sre.gob.mx/tramites/guiamigrante/default.htm. Unfortunately, U.S. media and policy makers classified the guide as a “comic book,” ignoring the portable needs of the intended audience and the guide’s “easy to decipher” format.

137. MEXICO AND THE MIGRATION PHENOMENON (2006), available at www.embassyofmexico.org/images/pdfs/Mexico%20and%20the%20Migration%20Phenomenon%20%2002%2003%202006.pdf.

138. *Id.*

of migrants (Mexico to the United States and back to Mexico).¹³⁹ The resolution suggests Mexican policy options to facilitate a circular flow.¹⁴⁰ These options focus on financial incentive for returning migrants in developing savings accounts, mortgages, and pension benefits.¹⁴¹ Mexican officials continued to voice support, and lobby legislators, for regularization and guest-worker programs to be included in bills before Congress.¹⁴² Similarly on March 20, 2006, Mexico included full page ads in the *New York Times*, *Washington Post*, and *Los Angeles Times* summarizing the resolution's main points.¹⁴³

IV. CONCLUSION

For over a decade, transnational research has illuminated that, despite not being solely incorporated into one national society or bound by political or territorial borders, migrants exert important political influence in receiving and sending political systems. Labeled a "transnational analysis," this essay applies questions inspired from transnational research to see if there has been any influence in the laws developed to regulate migration. This analysis examines Mexico's foreign relations law that addresses events outside its territory, such as migration to the United States. Foreign relations law is intimately related with sovereignty because sovereignty is the source of authority for a country's foreign relations. This transnational context is regulated by a legal doctrine premised on foreclosing foreign influence: absolute sovereignty in the norm of non-intervention. By painting a sovereign country's authority as exclusive and independent, absolute sovereignty squarely rejects transnational influence. This vision of sovereignty regards domestic jurisdiction and a country's independence as barring influence by other countries.

139. *Id.*

140. *Id.*

141. *Id.*

142. See E. Eduardo Castillo, *Mexican Government Applauds Senate Action on Immigration*, EL HISPANIC NEWS, Mar. 30, 2006; Olga. R. Rodriguez, *Mexico Optimistic for Immigrant Program*, BELLEVILLE NEWS DEMOCRAT, Mar. 28, 2006, at A3.

143. Press Release, Embassy of Mex., Message From Mexico About Migration (Mar. 20, 2006), available at http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=188&Itemid=2.

Recent developments in Mexican law suggesting there has been a transnational influence in how sovereignty is reasoned when applying the non-intervention norm. With this shift, Mexico stepped away from interpreting sovereignty as absolute. With traditional sovereignty reasoning, Mexico interpreted non-intervention as “a policy of no policy” regarding its migrants in the United States. Mexico viewed the concept of sovereignty as absolute and excluded any influence by Mexico regarding its nationals in the United States. This approach has been reinterpreted, as evidenced by Mexico’s lobbying of U.S. lawmakers for changes to IIRIRA and recent immigration proposals, negotiating a migration agreement with the United States, an extensive Consular program to represent migrants in the United States, and actively advocating for immigration reform and improved treatment for border crossers and migrants.

These developments are the result of a transnational influence in sovereignty reasoning in Mexico. There is a transnational influence because foreign policy decisions (to advocate for nationals abroad) were made for domestic benefit and because this benefit was not determined to conflict with U.S. domestic jurisdiction. The objectives of domestic politics and foreign relations are not as clearly separated as in the past, because migrants are abroad but have important influences in a sending society. Traditionally, Mexican foreign relations did not disturb U.S. jurisdiction out of concern for international sovereignty, as protected in the Estrada Doctrine and Constitutional Article 89:X. With the developments presented in this essay, sovereignty as currently interpreted by Mexican foreign relations readily embraces a transnational perspective after reinterpreting international law norms, based on sovereignty ideals, contained in domestic regimes.

